BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

WILLIAM L. FARMER, IV	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,066,934
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the February 17, 2016, Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on July 7, 2016.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed the Board may consult the *Guides.*[1] Claimant indicated he was no longer seeking payment of past medical expenses and payment of past medical expenses was no longer an issue.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. E.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sept. 15, 2011) and *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926 (Kan. WCAB May 21, 2008).

ISSUES

ALJ Howard found claimant sustained an injury by accident arising out of and in the course of his employment on June 28, 2013, which was the prevailing factor in claimant's need for medical care and claimant's disability. The ALJ awarded claimant permanent partial disability benefits based upon a 38.5 percent wage loss and a 57 percent task loss for a 47.75 percent work disability. The ALJ also awarded claimant related medical expenses and future medical benefits.

Respondent contends claimant's low back condition did not arise out of and in the course of his employment and that claimant's 2013 accident was not the prevailing factor causing his chronic low back pain and current need for treatment. Respondent submits claimant had significant preexisting low back problems as a result of a 2009 automobile accident.

Respondent argues claimant sustained no additional impairment attributable to his 2013 accident because his whole body functional impairment is the same after the accident as it was before the accident. Respondent also notes that considering K.S.A. 2013 Supp. 44-501(e), all of claimant's functional impairment was preexisting and should be deducted from any award in this case. Respondent maintains claimant failed to meet the functional impairment threshold contained in K.S.A. 2013 Supp. 44-510e. If work disability benefits are awarded, respondent asserts the work disability should be less than that found by the ALJ.

Respondent contends any need for future medical treatment is attributable to claimant's 2009 automobile accident, not the 2013 work accident. Further, respondent contends the ALJ erred in ordering payment of past medical bills. Respondent maintains no medical bills were submitted into evidence and the issue of past medical bills was not listed as an issue in either claimant's submission brief or during the regular hearing.

Claimant contends his work injury arose out of and in the course of his employment and is the prevailing factor in his current injury, medical condition, impairment and disability according to the expert testimony. Claimant argues he is permanently and totally disabled. If the Board finds claimant is entitled to a work disability, claimant asserts vocational rehabilitation counselor Terry L. Cordray's opinion was improperly overlooked by the ALJ and should be considered in claimant's wage loss calculations and vocational rehabilitation consultant Karen Crist Terrill's opinions should be excluded from said calculations. Claimant maintains he is entitled to future medical benefits.

The issues are:

1. Did claimant sustain a low back injury by accident arising out of and in the course of his employment? Specifically, was claimant's work accident the prevailing factor causing his low back injury, impairment and need for medical treatment?

2. What is claimant's functional impairment as a result of his work accident? Was all of claimant's functional impairment preexisting, as asserted by respondent?

3. Is claimant permanently totally disabled?

4. If claimant is not permanently totally disabled, is he entitled to a work disability? If so, what is his wage loss and task loss?

5. Is respondent entitled to a credit, pursuant to K.S.A. 2013 Supp. 44-501(e), for claimant's preexisting impairment?

6. Was the payment of past medical expenses an issue raised before the ALJ?

7. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

At the regular hearing, the ALJ recited stipulations and issues and indicated there was no outstanding indebtedness, medical mileage or prescriptions. He then asked the parties, "Does that sum us up, gentlemen?"[2] Claimant's attorney responded in the affirmative. In his submission letter, claimant did not request the ALJ order payment of past medical expenses, nor list that as an issue.

Claimant was an activity specialist at Osawatomie State Hospital. Playing basketball with patients at the facility was part of his duties. On June 28, 2013, claimant injured his back during such a game when a patient struck him in the back. Claimant testified he instantly went to his knees because of back pain. He was sent to a doctor by respondent and had an MRI. According to claimant, the MRI showed a herniated L4-5 disc putting pressure on a nerve going down the side of his right leg.

After being off work following his accident, claimant was released to return to his regular job duties on July 11. On September 2, 2013, respondent terminated claimant's employment.

Respondent denied compensability and claimant sought treatment on his own with Dr. Steven J. Hess, a neurosurgeon, who eventually performed surgery at L4-5 to alleviate his right-sided leg pain. Claimant indicated the surgery relieved his right leg pain, but not his back pain.

Claimant previously injured his back in an automobile accident in 2009. As a result of that accident, in 2010, Dr. Hess performed surgery at L4-5. Claimant testified he had

[2] R.H. Trans. at 4.

symptoms involving his left leg. He indicated the pain from his 2013 injury was much worse than his 2009 injury. After recovering from his 2010 surgery, claimant was able to play tennis, lift weights and had no restrictions.

Claimant confirmed that shortly before his 2013 accident, he took hydrocodone four to six times daily and extended-release morphine once or twice daily as needed for low back pain. He took hydrocodone every day when he got off work and after lifting weights. He also took morphine every day. The medications were prescribed by Dr. Ferguson's physician assistant, Monica Fisher.

From the time his employment was terminated until the October 2015 regular hearing, claimant completed two job applications. He also inquired about other jobs, but determined he could not do the job after talking with somebody or reading the job description. He estimated he had spoken to three of four persons about jobs. Claimant acknowledged receiving a list of approximately 4,600 available jobs in the area from vocational rehabilitation counselor Terry L. Cordray. He recalled looking into those jobs, but not applying for any. Claimant has applied for Social Security disability benefits and is supported by his mother.

Since claimant's work accident, he has not played tennis. When he drives a vehicle, he has pain. Claimant sometimes wears a back brace and sometimes walks with a limp, usually after a car ride. He also suffers from depression and low testosterone. According to claimant, the low testosterone causes weight gain, loss of energy and potential heart risk. Claimant testified he weighs 350 pounds.

Dr. Hess first saw claimant in 2010. Claimant reported injuring his back in a December 25, 2009, automobile accident. An MRI revealed a left-sided L4-5 disc herniation that definitely impinged the left L5 nerve root. The doctor performed a microdiscectomy on the left at L4-5. In October 2010, Dr. Hess indicated claimant needed to be weaned off Lortab.

In September 2011, claimant reported having some backache when he ran. Claimant indicated his leg felt much better. The doctor indicated claimant could swim, use an elliptical trainer and/or treadmill, stationary bicycle and do leg weightlifting. Dr. Hess gave claimant no permanent restrictions and provided no impairment rating.

Following claimant's 2013 work accident, he was referred to Dr. Hess by Ms. Fisher. The doctor saw claimant in August 2013 and noted that since claimant's 2010 surgery his leg pain subsided, but he struggled with back pain and required narcotic medications, including hydrocodone and extended-release morphine. On August 19, 2013, Dr. Hess noted:

> Lumbar MRI scan demonstrates a prior laminotomy changes on the left at L4-5. He has a central herniation with inferior migration and there [does] appear to be

> fragments on the right. There is also a bulge on the left but it looks like the right distal L5 root is definitely more impinged than anything on the left. The L4-5 level is moderately degenerative as well[.][3]

Dr. Hess testified that claimant's 2013 disc herniation was on the opposite side of his prior herniation. Dr. Hess surgically removed the new, right-sided disc herniation. He agreed it was the same procedure he performed in 2010, only on the right side. When Dr. Hess last saw claimant, his back pain was worse than prior to his work accident and claimant had too much pain to engage in sports and physical activities.

On June 4, 2014, the ALJ ordered claimant to be evaluated by Dr. Hess. In a December 2014 letter to the ALJ, Dr. Hess stated:

> The patient needs continued medical care for his back pain. I recommended physical therapy, and in addition to that, I believe that aqua therapy would be very good for him. He needs to lose weight to help his back. He has slightly progressive degenerative disc disease since his second surgery which is probably contributing to the chronic back pain. He may need further workup for this in the future including a lumbar discogram.
>
> The main factor that contributed to his second surgery was a work-related injury. He had pre-existing back pain which has subsequently intensified. The radicular pain/leg pain has completely resolved. As a result of the second injury, he will probably need a more sedentary work environment unless through physical therapy, exercise, and weight loss, he might one-day be able to return to teaching physical sports.[4]

Dr. Hess testified getting shoved in the back while playing basketball was the prevailing factor for claimant's right-sided L4-5 disc herniation. The doctor opined, within a reasonable degree of medical probability, claimant's 2013 work accident worsened his disc degeneration. Based on the *Guides*, Dr. Hess opined claimant had a 10 percent whole person functional impairment. The doctor opined that for claimant's condition before June 2013, he had a 9 to 10 percent functional impairment. The doctor testified:

> Q. Okay. You mention he had a 10 percent rating as it stands right now, and I know you didn't give a rating beforehand, but would his condition have been a ratable condition?
>
> A. Probably would have been a similar rating for that side, too.

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[3] Hess Depo., Ex. 2.

[4] *Id.*

> Q. And that's what I'm getting at. Essentially he had the same accident on the -- I should say the same injury on the right-hand side as compared to what he did on the left?
>
> A. Correct.
>
> Q. And the rating for both of those incidents would have been essentially the same?
>
> A. Correct. It would be similar as to if he would have had a left-sided L4-5 herniation at first and then this was a right-sided L2-3 herniation. They're two different events.[5]

The doctor hoped claimant would not need future surgery, but indicated there was a chance a fusion would be needed if claimant's back pain became too severe. However, the doctor indicated he did not have enough information to know if claimant will need a fusion. At his October 2015 deposition, Dr. Hess testified he thought claimant was on narcotic medication, but did not know if he would need ongoing pain management, because of not seeing claimant for almost a year.

Dr. Hess opined claimant could no longer perform 13 of 23 job tasks identified by Mr. Cordray, for a 57 percent task loss. The doctor thought claimant could return to a sedentary job.

At respondent's request, physical medicine and rehabilitation physician Dr. James S. Zarr evaluated claimant on July 19, 2013. The doctor was aware of claimant's 2009 automobile accident, 2010 surgery and that claimant took narcotic medications for back pain up to the time of his 2013 work injury. Dr. Zarr confirmed claimant's 2009 accident caused left leg symptoms. During the visit, claimant indicated he was capable of returning to work without restrictions.

Dr. Zarr's assessments were preexisting surgical changes from the prior low back surgery and right lumbar radiculopathy from a disc fragment pressing on the L5 nerve root on the right side. Dr. Zarr opined claimant's accident exacerbated a preexisting condition and was not the prevailing factor for his injury. When asked to explain, the doctor testified at his December 2015 deposition:

> We had a pre-existing condition of an L4-5 disc problem for which he underwent surgery. He underwent that surgery but still had chronic pain to the level that he was on high doses of morphine and Hydrocodone. And he was also on another medication for nerve pain. Then he suffered the basketball injury on 6/28/13. It

[5] Hess Depo. at 30.

> made a new disc protrusion on the same side but at the level of the same disc. So it made that problem worse.[6]

Dr. Zarr acknowledged that when he examined claimant, he had no left lower extremity deficits. The doctor agreed claimant had right lumbar radiculopathy with MRI documentation of an extruded disc fragment pressing on the L5 nerve root on the right side, which is a new finding and a change in his physiological condition. Dr. Zarr provided no impairment rating and, based on claimant's statement that he could return to full duty, gave claimant no restrictions.

Claimant, at the request of his counsel, was evaluated by orthopedic physician Dr. Edward J. Prostic on November 8, 2013. The doctor reviewed a July 11, 2013, MRI report and took x-rays. The doctor diagnosed claimant with a herniated disc at L4-5 on the right. Dr. Prostic indicated that in 2010, claimant underwent a discectomy at the same level, but on the opposite side of his 2013 surgery. The doctor testified claimant had an excellent result from his 2010 surgery.

Dr. Prostic opined claimant's 2013 work injury was the prevailing factor causing his injury at L4-5 on the right, resulting impairment and need for medical treatment. The doctor, based on the *Guides*, determined claimant had a 10 percent whole person functional impairment and was in DRE Lumbosacral Category III.

Dr. Prostic indicated claimant could perform occasional lifting of 50 pounds knee-to-shoulder height, but should minimize activities below knee level and above shoulder height. The doctor indicated claimant should avoid frequent bending or twisting at the waist, more than minimal use of vibrating equipment and captive positioning. Dr. Prostic agreed Dr. Hess' restrictions were appropriate.

Dr. Prostic could not state, more probably than not, that claimant will need future medical treatment other than continued medication for pain control and therapeutic exercises he can do at home. The doctor also testified that if claimant was taking the same medications in the same doses prior to his 2013 work accident that he took after the accident, the need for those medications is related to his previous accident. Any additional dosages are related to claimant's 2013 accident.

Dr. Prostic opined claimant could no longer perform 6 of 23 job tasks identified by Mr. Cordray, for a 26 percent task loss. The doctor opined claimant is capable of engaging in substantial and gainful employment.

Mr. Cordray met with claimant on May 15, 2014, for a vocational evaluation. He reviewed the records of Drs. Prostic, Hess, Zarr and Swetha Sridhar. Dr. Sridhar did not

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[6] Zarr Depo. at 9.

testify. Mr. Cordray testified Dr. Sridhar imposed restrictions of lifting no more than 20 pounds, no prolonged standing or walking longer than tolerated, no bending, no pushing/pulling more than 30 pounds, no squatting or kneeling and no driving a company vehicle. When Mr. Cordray evaluated claimant, he was taking hydrocodone, Cymbalta, Gralise and extended-release morphine. Mr. Cordray was aware of claimant's 2010 back surgery and that claimant underwent three right shoulder surgeries in 2003, 2005 and 2007.

Mr. Cordray noted claimant received a bachelor's degree in business management from Friends University in 2007. Claimant has taken some CPR and first-aid courses and has entry-level clerical skills. Claimant applied for a master's degree program, but was not accepted.

Since obtaining his bachelor's degree, claimant worked as a financial consultant, did appraisals for a government entity, owned and operated a restaurant and worked for respondent. Claimant reported his employment was terminated by respondent, but that respondent provided no reason for doing so. Mr. Cordray tested claimant's IQ, which was slightly below average. According to Mr. Cordray, claimant could not complete a master's degree program. Mr. Cordray testified claimant's need to constantly alternate sitting and standing and moving about and his medications affected his ability to maintain concentration to take the IQ test.

Mr. Cordray testified:

> When you look at the significant comments, restrictions made by the various physicians, Mr. Farmer -- although he's a young man, given the comments of the physicians that have been made that he has a failed back syndrome with drop foot, with the need to take multiples of narcotic medications throughout the day, that he cannot maintain a captive sitting position or standing position, that he can't bend at all, unfortunately, I don't think this man can be placed in any job.
>
> I do job placement and it's hard to tell the trier of fact that a 29-year-old man can't work. But under oath, I really don't think I can place this guy in a job. He can't lift over 20 pounds. He can't bend. He can't sit to do keyboarding. He can't stand to do retail sales and cashiering. He's taking Morphine and Oxycodone multiple times throughout the day. He has drop foot. Steve Hess is the best back doctor in town. And --[7]

On cross-examination, Mr. Cordray admitted Dr. Prostic said claimant could return to medium-level employment. Mr. Cordray acknowledged Dr. Sridhar's restrictions were likely temporary and that he missed the fact Dr. Sridhar/Concentra returned claimant to regular activity on July 11, 2013.

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[7] Cordray Depo. at 16-17.

Mr. Cordray confirmed the documents he received from Dr. Hess contained no permanent restrictions. When informed that Dr. Hess restricted claimant to sedentary jobs, Mr. Cordray did not think claimant could perform sedentary jobs because of the narcotic medications he was taking. The vocational expert indicated that in arriving at his conclusions, he utilized claimant's restrictions, and not the opinion claimant gave to Dr. Zarr that he is capable of working. Mr. Cordray had no opinion as to the wages claimant is capable of earning if he is not permanently totally disabled.

Karen Crist Terrill, a qualified rehabilitation professional licensed in Kansas, testified claimant graduated from college with a 3.6 grade point average and was a scholar-athlete. Ms. Terrill indicated claimant has first aid and CPR training and good familiarity with computers, including website building. She noted that in addition to working for respondent, claimant owned and operated his own restaurant, and was a detention officer, an appraisal assistant, a high school tennis coach and a customer service representative. Ms. Terrill identified 43 distinct job tasks that claimant performed in the five years preceding his accident.

Ms. Terrill testified that Dr. Hess' restriction of claimant performing only sedentary work meant claimant would lift up to ten pounds occasionally, five pounds frequently and nominal weight constantly and would be sitting for at least six hours in an eight-hour workday. She indicated Dr. Hess' restrictions were more restrictive than Dr. Prostic's, who allowed claimant to perform medium capacity work with some additional exertional limitations.

According to Ms. Terrill, claimant is capable of engaging in substantial and gainful employment. Using the Kansas Wage Survey, 2014 edition, Ms. Terrill felt claimant could earn $667.60 per week as a customer service representative, which calculates to a wage loss of 26 percent. She also felt claimant could work as a telemarketer and earn $526.40 per week, for a 41 percent wage loss. Ms. Terrill testified that employees in these positions are allowed to sit or stand, so long as they accomplish their tasks of aiding customers or selling products.

The ALJ found:

> 1. William L. Farmer, IV, the claimant, sustained an accidental injury arising out of and in the course of his employment with Respondent on June 28, 2013, that event being the prevailing factor and claimant's need for medical care, and resulting disability that claimant currently suffers. Claimant's accident constituted a change in the physical structure of his body, as defined above, specifically claimant sustained an additional herniation at the L4-L5 level, which necessitated the medical treatment provided him by Dr. Hess. That physical change constitutes a physical finding as demonstrated by the diagnosis test and the surgery results found by the treating physician.

. . .

3. The record contains no evidence regarding payments made for the surgery performed by Dr. Hess. Clearly, Dr[.] Hess's surgery was required to cure or relieve the effects of claimant's injury, and as such claimant is entitled to an award for any medical expenses incurred and related to the occupational injury of June 28, 2013.

. . .

5. Claimant is currently receiving narcotic medications in an attempt to reduce or eliminate the pain he experiences. The preponderance of medical evidence indicate[s] that claimant will continue to need medications, and possibly home therapeutic exercises, in the future. Accordingly, it is specifically determined as more probably true [than] not true that claimant is in need of on-going medical care and the same is herein awarded to be provided to claimant at the cost of Respondent.

. . .

7. The evidence disclosed herein, by claimant, Dr[.] Hess, Dr[.] Prostic, Dr[.] Zarr, and Karen Terrill all indicate that claimant possesses the ability to return to some substantial and gainful employment. Even claimant by his own testimony indicates that he probably could not return to his former occupation, but there were jobs available to him that he could perform in his current situation. Only Terry Cordray indicates that claimant is incapable of any substantial and gainful employment. The preponderance of evidence indicates that claimant is capable of substantial and gainful employment and is therefore not permanently totally disabled. The fact that claimant has not found employment, appears to be largely based upon claimant's limited seeking of employment, as demonstrated by his testimony at the first full hearing. Claimant indicated that he only completed a couple of job applications even though a period of almost two years had expired between the time he became MMI and the date of his testimony.

8. Claimant is entitled however, to a work disability as set forth above in K.S.A. 44-510e. The medical evidence which is persuasive herein based upon the testimony of Dr[.] Hess indicates that claimant has suffered a functional impairment equal to 10 percent body as a whole. Although claimant's impairment rating may not have changed from his prior surgery, the statute makes no declaration that it must be an additional 10 percent. Accordingly, the Administrative Law Judge finds that claimant has met the special requirement for work disability and the award of permanent partial general disability.

9. Based upon the testimony presented, Dr[.] Prostic has testified that claimant suffers a 26 percent task [loss] in his inability to perform the duties he

performed for the five years prior to his occupational accident. Dr[.] Hess testified that claimant suffers a 57 percent task [loss]. Dr[.] Zarr has indicated that claimant suffers no task [loss], however, Dr Zarr's opinion is not persuasive and is not considered, since his examination was conducted approximately two weeks after claimant sustained a June 28, 2013 accident, and before claimant underwent surgery. Regarding claimant's wage [loss], Terry Cordray offered no opinion regarding his ability to earn wages. However, Karen Terrill indicates that claimant suffers between a [26][8] percent and a 41 percent wage loss, based upon claimant's ability to secure employment as a telemarketer or customer service representative.

10. Based upon the testimony of Karen Terrill, the Administrative Law Judge finds that claimant has sustained a 38.5 percent wage loss. Regarding claimant's task loss, the Administrative Law Judge is persuaded by the testimony of Dr[.] Hess, indicating claimant suffers a 57 percent loss. Dr[.] Hess was the treating physician, the independent medical examiner, the physician who performed claimant's 2010 surgery, and the surgeon who performed the discectomy following the June 28, 2013 occupational accident. Accordingly, the Administrative Law Judge is persuaded by the testimony of Dr[.] Hess, and will not attempt to average that testimony with either Dr[.] Zarr or Dr[.] Prostic.

11. Based upon the foregoing, the Administrative Law Judge finds that claimant has sustained a 38.5 percent wage loss, a 57 percent task loss, for a combined permanent partial disability of 47.75 percent.[9]

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant sustained personal injury by accident arising out of and in the course of employment, including that his work accident was the prevailing factor causing his L4-5 right-sided disc herniation, need for medical treatment and resulting disability or impairment.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[10] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue

[8] The Award appears to be in error as the $667.60 Ms. Terrill opined claimant could earn as a customer service representative calculates to a wage loss of 26 percent.

[9] ALJ Award at 7-9.

[10] K.S.A. 2013 Supp. 44-501b(c).

is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[11]

Respondent asserts claimant failed to prove he sustained a low back injury by accident arising out of and in the course of his employment because his 2013 work accident was not the prevailing factor causing his injury, need for medical treatment and disability. Respondent relies on Dr. Zarr's opinion that claimant's 2013 work accident merely exacerbated a preexisting condition and was not the prevailing factor for his injury. The Board disagrees.

Drs. Hess and Prostic opined claimant's 2013 work accident was the prevailing factor causing his low back injury, need for medical treatment and disability. While Dr. Zarr held an opposing view, even he acknowledged claimant's 2013 work accident resulted in a new physiological change. The Board finds the opinions of Dr. Hess particularly credible because he was claimant's treating physician for his 2009 and 2013 injuries and was appointed by the ALJ to evaluate claimant. The Board also notes Dr. Hess is a neurosurgeon and Dr. Prostic is an orthopedic specialist, while Dr. Zarr is neither.

The Board also relies on past cases such as *MacIntosh*.[12] In 2009, MacIntosh had low back symptoms. An MRI revealed a mild posterior broad-based disk bulge at L3-4, a left paracentral mild protrusion at L4-5 and a mild posterior disk bulge at L5-S1. Claimant had a near full recovery from this incident. In 2010, MacIntosh complained of left lower back pain and received a trigger point injection. Claimant did not have any permanent limitations or restrictions regarding his low back and did not receive any treatment for his back during the intervening months until after a 2011 work incident. In 2011, MacIntosh was jolted while operating a forklift at work and felt immediate pain from his lower back going down to his right ankle. He was not having any problems with his lower back before the accident. The Board Member deciding *MacIntosh* held:

> It is clear that claimant had sought episodic treatment for low back pain before the work-related incident on June 17, 2011. Such treatment was primarily focused on pain that extended down into his left side and left lower extremity. A comparison of the [MRIs] performed before and after June 17, 2011, both revealed findings at L3-4, L4-5 and L5-S1. But after the June 17, 2011 accident claimant's pain complaints were on the right and extended down into the right lower extremity to the ankle. And this was corroborated by a new finding on MRI of a herniated disk at L5-S1 which impinged on the nerve. Thus, the accident did not solely aggravate a preexisting condition as claimant did not have a herniated disk at L5-S1 before the June 17, 2011 incident at work.

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[11] K.S.A. 2013 Supp. 44-508(h).

[12] *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

Another applicable case is *Ragan*.[13] Ragan suffered a 2006 work-related injury to his left wrist while hauling trash. The injury caused a partial rupture of a ligament in his wrist. In October 2011, Ragan reinjured his wrist at work, resulting in a complete rupture of the ligament in his left wrist. A Board Member determined Ragan sustained a change in the physical structure of his wrist and the October 2011 accident was the prevailing factor in causing claimant's current injury.

In *Gilpin*,[14] a Board Member determined Gilpin's work injury did not solely render his preexisting spondylolisthesis symptomatic, but rather, the structure of Gilpin's previously asymptomatic spondylolisthesis changed.

2. Claimant has a 10 percent whole person functional impairment as the result of his 2013 work accident.

Respondent contends Dr. Hess opined claimant had a 10 percent functional impairment prior to and after his 2013 work accident. Therefore, claimant sustained no new functional impairment as the result of his 2013 accident. That argument fails for the following reasons:

1. Claimant indicated his 2013 injury was much worse than his 2009 injury.

2. Dr. Hess did not indicate claimant's pre-2013 and 2013 accidents combined for a 10 percent functional impairment or that after claimant's 2013 accident, he had an overall 10 percent functional impairment. Rather, the doctor testified he would have assigned claimant a 9 or 10 percent functional impairment for his 2009 injury and assigned a 10 percent functional impairment for his 2013 injury. The doctor specified these were separate injuries with separate impairments. He testified it was similar to as if claimant had a left-sided L4-5 herniation at first and then a right-sided L2-3 herniation.

Claimant's 2013 injury was to a different part of his L4-5 disc and resulted in right-sided radiculopathy. The language of K.S.A. 2013 Supp. 44-510e(a)(2)(C) indicates that even though claimant has a preexisting impairment, he may be entitled to a work disability because his overall functional impairment is equal to or exceeds 10% to the body as a whole.

3. Claimant is not permanently totally disabled.

K.S.A. 2013 Supp. 44-510c(a)(2) provides:

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[13] *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

[14] *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

In *Wardlow*,[15] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable because he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether Wardlow was permanently totally disabled.

Claimant asserts he is permanently totally disabled. The Board disagrees for the following reasons:

1. Drs. Hess and Prostic indicated claimant is capable of engaging in substantial and gainful employment.

2. Claimant has a college degree and did well in college.

3. Dr. Hess restricted claimant to performing at least sedentary jobs and Dr. Prostic's restrictions allow claimant to perform medium-level jobs. Under either set of restrictions, claimant can engage in substantial and gainful employment.

4. Although claimant is taking narcotic medications and has a slightly below average IQ, he was able to find and keep employment prior to his work accident when he also was taking narcotic medications.

5. Claimant is only 32 years of age.

6. Claimant has a wide array of experience. He ran his own restaurant and worked as an appraisal assistant, activities specialist and customer service representative.

7. In a period of two years, claimant applied for only two jobs and has self-limited his search for employment.

8. Mr. Cordray opined claimant is unemployable. That opinion is based, in part, upon Dr. Sridhar's restrictions. Dr. Sridhar did not testify. K.S.A. 44-519 provides the

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[15] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

report of a health care provider is not admissible unless he or she testifies. Therefore, Mr. Cordray's opinion that claimant is permanently totally disabled is not persuasive because it was based in part upon a medical report not placed into evidence.[16] In addition, Mr. Cordray indicated that in arriving at his opinion, he did not utilize claimant's opinion that he is capable of substantial and gainful employment, but instead relied on restrictions imposed by the physicians.

9. Claimant argues that although Ms. Terrill indicated claimant could work as a customer service representative or telemarketer, he could only do so if accommodated. Therefore, her opinion is erroneous that claimant can perform substantial and gainful employment. That misinterprets Ms. Terrill's testimony. Ms. Terrill indicated customer service representatives and telemarketers are permitted to alternate between sitting and standing, as long as they accomplish their respective tasks of aiding customers or selling products. Thus, claimant needs no accommodations to work as a customer service representative or telemarketer.

10. On July 19, 2013, claimant told Dr. Zarr he could return to work without restrictions. After being released to return to regular activity on July 11, claimant performed his regular job duties for respondent until September 2, 2013, when he was terminated.

4. Claimant sustained a 33.5 percent wage loss and a 41.5 percent task loss for a 37.5 percent work disability.

K.S.A. 2013 Supp. 44-510e(a)(2)(C), in part, states:

> An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
>
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
>
> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

Even if claimant had a preexisting 10 percent functional impairment and after his 2013 accident has a 10 percent functional impairment, he is entitled to a work disability

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[16] *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997) and *Daily v. Sirloin Stockade*, No. 109,469, 2014 WL 1612487 (Kansas Court of Appeals unpublished opinion filed April 18, 2014).

under K.S.A. 2013 Supp. 44-510e(a)(2)(C)(i). The language of K.S.A. 2013 Supp. 44-510e(a)(2)(C)(i) is plain and unambiguous. As noted in *Bergstrom*, "When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be."[17]

Claimant asserts he sustained a 100 percent wage loss because Mr. Cordray opined claimant was not capable of earning wages. That statement goes to whether or not claimant was permanently totally disabled. Mr. Cordray had no opinion as to the wages claimant was capable of earning if he was not permanently totally disabled.

The only vocational opinion on claimant's capability to earn wages came from Ms. Terrill. She gave a range of a 26 to 41 percent wage loss. Respondent urges the Board to find claimant has a 26 percent wage loss. Respondent asserts the Board should take into consideration the fact that claimant applied for only two jobs since being terminated. The Board concludes claimant has a 33.5 percent wage loss and adopts the ALJ's legal analysis.

Claimant requests the Board affirm the ALJ's finding that claimant sustained a 57 percent task loss and respondent asserts claimant has a 26 percent task loss. The doctors' task loss opinions are based on different restrictions. Dr. Hess felt claimant could only perform sedentary work, while Dr. Prostic provided claimant lesser restrictions, but agreed Dr. Hess' restrictions were appropriate.

The Board gives equal weight to the task loss opinions of Drs. Hess and Prostic and finds claimant has a 41.5 percent task loss. As noted in the findings of fact, the doctors provided claimant different restrictions and disagreed as to whether claimant could perform seven job tasks. Both sets of restrictions and task loss opinions are reasonable, given claimant's back condition. Prior to claimant's work injury, he was able to perform the seven additional tasks that Dr. Hess opined he could no longer perform. Yet, his work injury and subsequent medical treatment was similar in nature to his 2009 injury. Dr. Zarr's opinions that claimant suffered no impairment and had no restrictions are not credible. Those opinions are inconsistent with the opinions of Drs. Prostic and Hess.

Using the prescribed formula in K.S.A. 2013 Supp. 44-510e(a)(2)(C)(ii), the Board finds claimant has a 37.5 percent work disability.

5. Respondent is entitled to a 10 percent credit against claimant's work disability for his preexisting functional impairment.

K.S.A. 2013 Supp. 44-501(e) states:

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[17] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

> An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

Dr. Hess opined claimant had a preexisting 9 or 10 percent functional impairment. Drs. Zarr and Prostic indicated claimant had a preexisting back condition, but were not asked to provide an impairment rating. Therefore, Dr. Hess' opinion is uncontroverted.

Dr. Prostic indicated claimant's work injury placed him in DRE Lumbosacral Category III and he had a 10 percent functional impairment. As noted above, Dr. Hess determined claimant's work injury resulted in a 10 percent functional impairment. *Tovar*[18] allows the Board to weigh the evidence and make its own conclusions as to claimant's functional impairment. Because claimant's work injury, symptoms and medical treatment were similar to his 2009 injury, the Board finds claimant had a 10 percent preexisting functional impairment.

Respondent is entitled to a reduction for claimant's preexisting 10 percent whole person functional impairment. Pursuant to K.S.A. 2013 Supp. 44-501(e)(2)(B), claimant's 10 percent preexisting impairment is subtracted from his 37.5 percent work disability, for a 27.5 percent work disability award.

6. The Board vacates that part of the Award requiring respondent to pay claimant's past medical expenses.

This issue was not raised at the regular hearing or in claimant's submission letter to the ALJ. Yet, the Award required respondent to pay all of claimant's past medical expenses related to his work injury. The Board is cognizant that K.S.A. 2013 Supp. 44-510h(a) imposes a duty upon respondent to provide medical treatment for claimant. K.S.A. 2013 Supp. 44-501b(c) requires claimant to prove his right to an award of compensation. Medical expenses are compensation. Respondent was not aware payment of past medical expenses was an issue until said medical expenses were ordered paid by the ALJ. Respondent was not given an opportunity to litigate this issue before the fact finder. Respondent was not afforded due process and the Board vacates that part of the Award requiring respondent to pay claimant's past medical expenses.

The Board also notes that at oral argument, claimant indicated he was not seeking payment of past medical expenses. That further indicates this was not an issue raised before the ALJ.

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[18] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

7. Claimant is entitled to future medical treatment.

The Board adopts the legal reasoning set forth in Findings of Fact No. 5 on page eight of the Award.

CONCLUSIONS

1. Claimant sustained personal injury by accident arising out of and in the course of employment and his work accident was the prevailing factor causing his L4-5 right-sided disc herniation, need for medical treatment and disability or impairment.

2. Claimant has a 10 percent whole person functional impairment as the result of his 2013 work accident.

3. Claimant is not permanently totally disabled.

4. Claimant sustained a 33.5 percent wage loss and a 41.5 percent task loss for a 37.5 percent work disability.

5. Respondent is entitled to a 10 percent credit against claimant's work disability for his preexisting functional impairment.

6. The Board vacates that part of the Award requiring respondent to pay claimant's past medical expenses.

7. Claimant is entitled to future medical treatment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[19] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the February 17, 2016, Award entered by ALJ Howard by finding claimant has a 37.5 percent work disability against which respondent is given a credit for claimant's 10 percent preexisting functional impairment. Claimant is entitled to .85 weeks of temporary total disability compensation at the rate of $570 per week, or $484.50, followed by 114.13 weeks (415 weeks x 27.5 percent) of permanent partial disability compensation at the rate of $570 per week, or $65,054.10, for a 27.5 percent work disability and a total award of $65,538.60, all of which is due and owing, less

[19] K.S.A. 2015 Supp. 44-555c(j).

any amounts previously paid. The Board vacates that part of the Award requiring respondent to pay claimant's past medical expenses. All of the other orders of the ALJ contained in the Award not inconsistent herewith remain in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of August, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
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Honorable Steven J. Howard, Administrative Law Judge